



6325-39

**U.S. OFFICE OF PERSONNEL MANAGEMENT**

**5 CFR PART 213**

**RIN 3206-AM07**

**Excepted Service -- Appointment of Persons with Intellectual Disabilities, Severe Physical**

**Disabilities, and Psychiatric Disabilities**

**AGENCY:** U.S. Office of Personnel Management.

**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Office of Personnel Management (OPM) is proposing to amend its regulations pertaining to the appointment of persons with disabilities. The proposed changes eliminate the requirement that an applicant supply a certification of job readiness and provide clarification on appointments under this authority. In addition, OPM is cognizant of a change in terminology as evinced, for example in “Rosa’s Law,” which Congress enacted in October of 2010. Although Rosa’s Law is not applicable here, it has prompted us to reconsider our own use of terminology, and we propose to substitute the phrase “intellectual disability” for the phrase “mental retardation” throughout this Part, without any change in the intended coverage.

**DATES:** We will consider comments received on or before [INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by RIN number 3206-AM07, by any of the following methods:

*Federal eRulemaking Portal:* <http://www.regulations.gov>. All submissions received through the Portal must include the agency name and docket number or Regulation Identifier

Number (RIN) for this proposed rulemaking. Additional instructions are provided at the regulations.gov website.

E-mail: [employ@opm.gov](mailto:employ@opm.gov). Include the RIN 3206-AM07 in the subject line of the message.

Fax: (202) 606-2329.

Mail: Karen R. Jacobs, Acting Deputy Associate Director for Recruitment and Hiring Policy, U.S. Office of Personnel Management, Room 6551, 1900 E Street, N.W., Washington, DC 20415-9700.

Hand Delivery/Courier: OPM, Room 6551, 1900 E Street, N.W., Washington, DC, 20415.

**FOR FURTHER INFORMATION CONTACT:** Gale Perryman by telephone on 202-606-1143, by FAX on 202-606-4430, by TDD on 202-418-3134, or by email at [gale.perryman@opm.gov](mailto:gale.perryman@opm.gov).

**SUPPLEMENTARY INFORMATION:** The U.S. Office of Personnel Management (OPM) is proposing to revise the regulations in 5 CFR 213.3102(u) governing the appointment of people with mental retardation, severe physical disabilities, and psychiatric disabilities. Paragraph (u) of section 213.3102 implements Executive Orders 12125 and 13124 to provide a special hiring authority for people with intellectual disabilities, severe physical disabilities, and psychiatric disabilities. This Schedule A authority is subject to the general provisions of Subpart A, 5 CFR 213 for temporary and time-limited appointments. The proposed revisions are described below:

### **Subpart C Excepted Schedules**

On October 6, 2010, Congress enacted “Rosa’s Law,” which changes references from “mental retardation” or “individuals with mental retardation” to “intellectual disability” or

“individual with intellectual disability” in various statutes the law amended and required conforming changes in related regulations. Although Rosa’s Law is inapplicable to the President’s creation of an excepted service hiring authority for persons with specified disabilities, this statute nevertheless prompted OPM to reconsider its own use of terminology. As a result of that process, we propose to revise our language to replace the term “mental retardation” with the currently more commonly used term “intellectual disability.” We added a new paragraph (u)(2) Definitions, to define “intellectual disability” as meaning only those intellectual disabilities that would, under prior iterations of this regulation, have been encompassed by the term “mental retardation.” This addition causes all current paragraphs to change by one number.

Section 213.3102(u)(3)(i) currently requires all applicants seeking either a permanent or time-limited appointment to supply a “certification of job readiness.” This certification, which may be prepared by one of the entities identified in 213.3102(u)(2), has been used as the basis for determining that an applicant can reasonably be expected to perform in a particular work environment. For instance, the certification of readiness for an individual applying for a position as an Administrative Assistant or Accountant might state that the applicant “is likely to succeed performing work in an office environment.” In the alternative, the current 213.3102(u)(3)(ii) allows agencies to give individuals a temporary appointment to establish their ability to perform in the relevant environment when the certification of job readiness has not been provided.

We believe that a requirement that applicants provide a separate “certification of job readiness” is not necessary. Persons with disabilities today often have work, educational, or other relevant experience that an agency may rely upon to determine whether they are likely to succeed in a particular work environment. Agencies also possess the option of giving

individuals a temporary appointment that will allow them to establish their job readiness. In those circumstances, the agency may convert the individual to a permanent appointment, once it determines that the individual is able to perform the duties of the position.

Elimination of the requirement that applicants supply a certification of job readiness will speed the hiring process for agencies and remove an unnecessary burden on applicants with disabilities. This is consistent with the policy outlined in the President’s Memorandum of May 11, 2010 regarding the elimination of unnecessary complexities and inefficiencies in the federal hiring process.

The proposed section 213.3102(u)(4) provides for permanent or time-limited appointment options when individuals have proof of disability and an agency determines that they are “job ready”—that is, that they are likely to succeed in performing in the required work environment. Under the proposed regulations, the agency determination of job readiness may be based upon any relevant work, educational, or other experience. Section 213.3102(u)(5) addresses temporary employment options, mainly when a determination of job readiness cannot be made based on an individual’s prior work, educational, or other experience. We propose to modify this section to clarify the appropriate uses of the temporary employment option (i.e. to determine job readiness, or when the duties to be performed are truly of a short-term nature).

### **Regulatory Flexibility Act**

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it affects only certain potential applicants and Federal employees.

### **Executive Order 12866, Regulatory Review**

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

### **List of Subjects in 5 CFR Parts 213**

Government employees, Excepted Schedules.

U.S. Office of Personnel Management.

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John Berry,  
Director.

Accordingly, OPM is proposing to revise 5 CFR 213.3102 as follows:

### **PART 213—EXCEPTED SERVICE**

1. The authority citation for part 213 is revised to read as follows:

**Authority:** 5 U.S.C. 3161, 3301 and 3302; E.O. 10577, 3 CFR 1954-1958 Comp., p. 218; Sec. 213.101 also issued under 5 U.S.C. 2103. Sec. 213.3102 also issued under 5 U.S.C. 3301, 3302, 3307, 8337(h), and 8456; E.O. 13318, 3 CFR 1982 Comp., p. 185; 38 U.S.C. 4301 *et seq.*; Pub. L. 105-339, 112 Stat 3182-83; E.O. 13162; E.O. 12125, 3 CFR 1979 Comp., p. 16879; and E.O. 13124, 3 CFR 1999 Comp., p. 31103; and Presidential Memorandum—Improving the Federal Recruitment and Hiring Process (May 11, 2010).

2. In §213.3102 revise paragraph (u) to read as follows:

#### **§ 213.3102 Entire executive civil service.**

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(u) *Appointment of persons with intellectual disabilities, severe physical disabilities, or psychiatric disabilities* —(1) *Purpose.* An agency may appoint, on a permanent, time-limited,

or temporary basis, a person with an intellectual disability, a severe physical disability, or a psychiatric disability according to the provisions described below.

(2) *Definition.* “Intellectual disabilities” means only those disabilities that would have been encompassed by the term “mental retardation” in previous iterations of this regulation and the associated Executive Order, Executive Order 12125, dated March 15, 1979.

(3) *Proof of disability.* (i) An agency must require proof of an applicant's intellectual disability, severe physical disability, or psychiatric disability prior to making an appointment under this section.

(ii) An agency may accept, as proof of disability, appropriate documentation (e.g., records, statements, or other appropriate information) issued from a licensed medical professional (e.g., a physician or other medical professional duly certified by a State, the District of Columbia, or a U.S. territory, to practice medicine); a licensed vocational rehabilitation specialist (State or private); or any Federal agency, State agency, or an agency of the District of Columbia or a U.S. territory that issues or provides disability benefits.

(4) *Permanent or time-limited employment options.* An agency may make permanent or time-limited appointments under this subsection where an applicant supplies proof of disability as described in paragraph (3) above and the agency determines that the individual is likely to succeed in the performance of the duties of the position for which he or she is applying. In determining whether the individual is likely to succeed in performing the duties of his position, the agency may rely upon the applicant’s employment, educational, or other relevant experience, including but not limited to service under another type of appointment in the competitive or excepted services.

(5) *Temporary employment options.* An agency may make a temporary appointment when:

(i) It is necessary to observe the applicant on the job to determine whether the applicant is able or ready to perform the duties of the position. When an agency uses this option to determine an individual's job readiness, the hiring agency may convert the individual to a permanent appointment in the excepted service whenever the agency determines the individual is able to perform the duties of the position; or

(ii) The work is of a temporary nature.

(6) *Noncompetitive conversion to the competitive service.* (i) An agency may noncompetitively convert to the competitive service an employee who has completed 2 years of satisfactory service under this authority in accordance with the provisions of Executive Order 12125 as amended by Executive Order 13124 and §315.709 of this chapter, except as provided in (u)(6)(ii).

(ii) Time spent on a temporary appointment specified in paragraph (u)(5)(ii) of this section does not count towards the 2-year requirement.

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**Billing Code 6325-39**

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